

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

COURT OF APPEALS OF NEW MEXICO
FILED

Applicant-Appellant,

OCT 07 2013

Wendy F. Jones

v.

No. 32,705

SCOTT A. VERHINES, P.E.,

New Mexico State Engineer-Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants-Appellees.

REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF CATRON COUNTY

MATTHEW G. REYNOLDS, District Judge

Oral Argument Is Requested

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Note regarding record citations: Citations in this brief to the record proper and the Answer Briefs are in the following forms:

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Statement of Compliance: I certify in accordance with Rule 12-213 NMRA that this brief was prepared using a fourteen-point, proportionally spaced typeface with Microsoft Word 2010 and that the body of the brief contains 4,383 words.

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INTRODUCTION

Appellant Augustin Plains Ranch, LLC (Augustin) respectfully submits this brief in reply to the Answer Briefs of Appellees New Mexico State Engineer (State Engineer), multiple Protestants (Protestants), and Cuchillo Valley Community Ditch Association (Cuchillo).

Appellees' principal argument is that Augustin was not entitled to an evidentiary hearing and it received the process it was due when the State Engineer heard oral argument of counsel before granting motions to dismiss the Application. That argument is controlled by *Derringer v. Turney*, 2001-NMCA-075, ¶ 15, 131 N.M. 40, 33 P.3d 40, which rejects substantially the same contention. Appellees' position also conflicts with *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 31, 147 N.M. 523, 226 P.3d 622, which recognizes the State Engineer's duty to consider the full merits of an application except where the Water Code specifically directs otherwise. As elaborated below, Appellees' arguments should be rejected and the case should be remanded to the State Engineer for the evidentiary hearing to which Augustin is entitled.

ARGUMENT

THE DISTRICT COURT ERRED IN UPHOLDING THE STATE ENGINEER'S DENIAL OF THE APPLICATION WITHOUT AN EVIDENTIARY HEARING

A. Augustin Was Entitled to an Evidentiary Hearing

Augustin has demonstrated that the governing provisions of the Water Code, read as a harmonious whole, required the State Engineer to afford it an evidentiary hearing after having accepted the Application for filing and publication. [BIC 13-46]; see NMSA 1978, § 72-12-3 (2001), § 72-2-16 (1973), § 72-2-17 (1965). Appellees argue that no evidentiary hearing was required, and that Augustin received the process that was due when oral argument of counsel was heard before the motions to dismiss the Application were granted. [AB-SE 17-25; AB-PR 17-33; AB-CV 12-14]. Appellees are mistaken.

The State Engineer argues that if and when he chooses to hold a hearing on an application, no particular “scope or type of hearing . . . is required.” [AB-SE 9-10]. He says that Section 72-2-17 “merely provides for hearings generally.” [AB-SE 17]. He acknowledges that “Section 72-2-17 applies to all hearings before the State Engineer.” [*Id.*]. Yet he contends that it is up to him whether a hearing will be held and, if so, whether it will be an evidentiary hearing. [*Id.*] (arguing that Section 72-2-17 provides for hearing on the merits only “if an application proceeds to an evidentiary hearing”). He says that he “is not required to hold any type of

hearing before denying an application” under Section 72-12-3(F), which in his view allows him to act on an application “with or without holding a hearing.” [AB-SE 9, 29-30] In short, according to the State Engineer, an evidentiary hearing is a matter of administrative grace.

Derringer forecloses the State Engineer’s argument. This Court recognized that the “plain language” of the Water Code “guarantees an aggrieved party one hearing.” 2001-NMCA-075, ¶ 13; *see* § 72-2-16 (providing that aggrieved party “is entitled to a hearing” upon timely request). The Court recognized that Section 72-2-17(B) “sets forth the requirements for the conduct of hearings before the state engineer” and “states that the parties shall be afforded an opportunity ‘to appear and present evidence and argument on all issues involved.’” *Derringer*, 2001-NMCA-075, ¶ 15 (quoting § 72-2-17(B)(1)). Thus, hearings before the State Engineer are a matter of right, not of grace, and the type of hearing that is required is an evidentiary hearing. *Id.* ¶¶ 13, 15; *accord Tri-State Generation & Transmission Ass’n v. D’Antonio*, 2012-NMSC-039, ¶ 13, 289 P.3d 1232 (recognizing that State Engineer is “limited to the power and authority expressly granted or necessarily implied” by governing statutes) (citation and internal quotation marks omitted).

Protestants argue that oral argument of counsel on the motions to dismiss was Augustin’s opportunity to be heard. [AB-PR 16, 20, 32]; *see also* [AB-SE 12]

(arguing that Augustin “was not entitled to a hearing other than the one it received”). That argument too is foreclosed by *Derringer*. The written motions and responses in *Derringer* did not amount to the required evidentiary hearing because they did not afford the parties the opportunity to present evidence on all issues involved. *Derringer*, 2001-NMCA-075, ¶ 15. Here too, Section 72-2-17’s requirements were not met by written arguments on the motions to dismiss, and neither were they met by the oral ones, because the parties were given no opportunity to present evidence on all issues involved.

Protestants further argue that there is no right to an evidentiary hearing in the State Engineer’s proceedings because Section 72-2-17 does not use the term “evidentiary hearing” and it does use the word “motions.” [AB-PR 17-18]. Without saying “evidentiary hearing,” however, Section 72-2-17 says enough by requiring “that the parties shall be afforded an opportunity ‘to appear and present evidence and argument on all issues involved.’” *Derringer*, 2001-NMCA-075, ¶ 15 (quoting § 72-2-17(B)(1)). Moreover, the mention of “pleadings, motions, intermediate rulings” in no way negates the right to present evidence on all issues involved as well as to confront and cross-examine adverse witnesses “for a full and true disclosure of the facts.” Compare § 72-2-17(C)(1), with §§ 72-2-17(B)(1), (3).

Protestants quote selectively from Section 72-2-12, regarding the conduct of hearings before the State Engineer. [AB-PR 18]. But they omit the language of that

section directing that hearing examiners shall preside over “the swearing of witnesses, [and] receiving of testimony and exhibits offered in evidence subject to such objections as may be imposed”; that they “shall cause a complete record of the proceedings to be made”; and that the State Engineer “shall base his decision rendered in any matter heard by an examiner upon the record made . . . in connection with such proceeding.” NMSA 1978, § 72-2-12 (1965).

Protestants argue that the legislative history supports the dismissal of an application without an evidentiary hearing because, in the period 1967-1971, hearings were conducted in the district courts “as cases originally docketed” in those courts, and the district courts in their original jurisdiction routinely hear dispositive motions. [AB-PR 18-19] (quoting *Hobbs v. State ex rel. Reynolds*, 1970-NMSC-133, ¶ 4, 82 N.M. 102, 476 P.2d 500) (quoting in turn 1967 N.M. Laws ch. 308, § 2); cf. [BIC 28-30]. As our Supreme Court has explained, however, “[t]he purpose of the language . . . ‘as cases originally docketed in the district courts’ was not to give the judiciary de facto original jurisdiction over water rights applications,” but rather to empower the district courts to “hear new and additional evidence and form its own conclusions based upon that evidence.” *Lion’s Gate Water*, 2009-NMSC-057, ¶ 30. Thus, the effect of the 1967 and 1971 amendments, far from abrogating the longstanding right to an evidentiary hearing, was to *augment* a party’s right to be heard on the merits by allowing the district

court to hear additional evidence. *Id.* ¶¶ 22, 28-30; *see* NMSA 1978, § 72-7-1(E) (1971) (continuing to provide for de novo review in district court). Here, the State Engineer impermissibly denied Augustin all opportunity to be heard on the merits, and the district court erroneously upheld that result.

Appellees further argue that the decision in *Lion's Gate Water* supports denial of the Application without an evidentiary hearing. The State Engineer argues that *Lion's Gate Water* recognizes his authority to “dispos[e] of a case without a hearing” when he deems an “appropriate threshold issue” amenable to summary disposition. [AB-SE 8, 14, 16-17]. Cuchillo similarly argues that if availability of unappropriated water was a proper threshold issue in *Lion's Gate Water*, then it must follow that the State Engineer may decide “other threshold legal issues without an evidentiary hearing” in other cases. [AB-CV 12-13]. Protestants argue that the directive in *Lion's Gate Water* to “consider the full merits of an application” is mere dicta, and anyway that considering the full merits of an application does not mean holding an evidentiary hearing. [AB-PR 23-25].

Appellees' contentions conflict with the governing statutes as well as with *Lion's Gate Water* itself. Our Supreme Court emphasized that the reason that the State Engineer must first decide the issue of availability of unappropriated water is that the statutes require it. *Lion's Gate Water*, 2009-NMSC-057, ¶¶ 25-27 (applying NMSA 1978, §§ 72-5-6, 72-5-7 (1985)). Indeed, the State Engineer

himself aptly notes that the holding in *Lion's Gate Water* was reached "in the context of the very specific language of the surface water code, which differs in pertinent part from the groundwater code." [AB-SE 21]. The groundwater statute governing Augustin's Application contains no similar directive to decide a threshold issue, such as availability of unappropriated water, before other issues. § 72-12-3. Unlike Section 72-5-7, which applied in *Lion's Gate Water*, nothing in Section 72-12-3 authorizes the State Engineer, after acceptance of an application, to "reject" or "refuse to consider" it. Compare § 72-12-3, with § 72-5-7.

Moreover, even in surface water cases where Section 72-5-7 requires the State Engineer to deny an application based on a threshold finding of unavailability of water, the applicant is still entitled to an evidentiary hearing on that issue. *Lion's Gate Water*, 2009-NMSC-057, ¶ 32 (recognizing that upon determination that no unappropriated water is available, applicant may "request a Section 72-2-16 hearing before the State Engineer, who would be jurisdictionally limited to that dispositive, threshold issue"); see also *Headen v. D'Antonio*, 2011-NMCA-058, ¶ 7, 149 N.M. 667, 253 P.3d 957 (recognizing that under *Lion's Gate Water*, applicant aggrieved by finding of unavailability of water may request hearing on that issue and "[t]he State Engineer must hold the hearing if requested by the aggrieved party"). Protestants incorrectly assert that "*Lion's Gate* never mentions 'evidentiary hearing.'" [AB-PR 23]. In fact, an "evidentiary hearing" is precisely

what was at issue in *Lion's Gate Water*, 2009-NMSC-057, ¶ 15, and the Court referred to such a "hearing" when it concluded that "following a determination that water is available to appropriate, the State Engineer must consider the full merits of an application." *Id.* ¶¶ 31-32.

Contrary to Protestants' contention [AB-PR 23-24], the State Engineer's "refus[al] to consider" the Application does not fulfill his duty to "consider the full merits" of the Application. [RP 5, 7 (¶¶ 7, 21-24)]. Protestants note that certain summary dispositions in the district courts are designated as "on the merits" for purposes of claim and issue preclusion doctrines. [AB-PR 24]. But that designation only signifies that relitigation is precluded, not that any type of evidentiary hearing has been afforded. *E.g.*, *Cordova v. State*, 2005-NMCA-009, ¶ 38, 136 N.M. 713, 104 P.3d 1104 (collateral estoppel); *see Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399 (1981) (*res judicata*). In its ordinary sense, by contrast, to consider a party's claim "on the merits" means to afford the party a trial or evidentiary hearing. *E.g.*, *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 43, 148 N.M. 646, 241 P.3d 1086 (observing that "[b]ecause resolution *on the merits* is favored," court draws all reasonable inferences against summary judgment and "in support of a trial *on the merits*") (emphasis added).

Protestants argue that the State Engineer's refusal to hear evidence did not deny Augustin due process because, they claim, (1) Augustin had no property

interest at issue, and (2) it was “afforded a meaningful opportunity to present its case.” [AB-PR 32]. Both contentions are meritless. Augustin had a property interest at issue because its Application sought a permit to use water, and “the right to use water is considered a property right.” *Walker v. United States*, 2007-NMSC-038, ¶ 21, 142 N.M. 45, 162 P.3d 882. And a meaningful opportunity to “present its case” is precisely what Augustin was denied when the State Engineer refused to hold an evidentiary hearing. Indeed, the very purpose of an evidentiary hearing is to afford a party a meaningful opportunity to present its case. *Derringer*, 2001-NMCA-075, ¶¶ 13, 15; see *D’Antonio v. Garcia*, 2008-NMCA-139, ¶ 9, 145 N.M. 95, 194 P.3d 126.

Finally, the out-of-state cases cited by the parties are consistent with New Mexico law in honoring the right to a hearing on the merits of a water rights application. Protestants seek to distinguish *Colorado v. Southwestern Colorado Water Conservation Dist.*, 671 P.2d 1294, 1321 (Colo. 1983) (en banc), *superseded by statute on other grounds as stated in Humphrey v. Sw. Dev. Co.*, 734 P.2d 637, 640 n.2 (Colo. 1987) (en banc), on the basis that a water rights adjudication in Colorado often depends on a “fact-intensive inquiry,” whereas in their view “no trial is needed” in a water rights adjudication in New Mexico. [AB-PR 27-29]. The New Mexico Legislature has not accepted Protestants’ view, however, that no hearing on the merits is needed. See §§ 72-2-16, 72-2-17.

The Colorado cases cited by Cuchillo do not support a contrary result. [AB-CV 10-12]. The right to an evidentiary hearing was not at issue in *High Plains A&M, LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005) (en banc), because in that case both the applicant itself and the objectors moved for summary determinations. *Id.* at 716. Conversely, in *Colorado River Water Conservancy Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979) (en banc), *superseded by statute on other grounds as stated in FWS Land & Cattle Co. v. Colorado*, 795 P.2d 837, 840 (Colo. 1990) (en banc), a trial on the merits was afforded to the parties, and it was on the basis of the evidence at trial that the applicant's request for relief was partially denied. *Id.* at 567-69. New Mexico and Colorado cases alike confirm that, when a water rights applicant exercises its right to a hearing, an evidentiary hearing must be held. *See Lion's Gate Water*, 2009-NMSC-057, ¶ 31; *Southwestern Colorado Water Conservation Dist.*, 671 P.2d at 1321.

B. The State Engineer Impermissibly Denied Augustin a Hearing

Augustin has previously shown that its Application contained all of the information required by Section 72-12-3 for acceptance by the State Engineer. [BIC 1-3, 30-31]. And, indeed, "the parties agree that [the State Engineer's water rights division] accepted the Application under Section 72-12-3(C)." [AB-SE 8]; *accord* [AB-PR 26]. The acceptance of the Application necessarily entails a

determination that it contains the information required by Section 72-12-3, because the statute prohibits the State Engineer from accepting any application “unless it is accompanied by all the information required” by that section. § 72-12-3(C). Appellees contend, however, that no legal significance should be ascribed to the State Engineer’s acceptance of the Application; in their view the State Engineer should remain free to change his mind at any time and to withhold the procedural protections afforded by the Water Code when an application has been accepted. [AB-SE 25-31; AB-PR 26-27]. Appellees’ contention should be rejected.

If it were true that the acceptance of an application was merely a “ministerial act” performed by clerical staff with no discretion to reject the filing, then there would be more weight to the State Engineer’s contention that acceptance entails no finding of conformance. [AB-SE 26, 28]. For example, a court clerk’s acceptance of a pleading for filing does not imply a determination that the pleading is in proper form, for the simple reason that “a court clerk lacks the discretion to reject pleadings for technical violations.” *Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 10, 131 N.M. 32, 33 P.3d 32. It follows that a district judge may review a pleading for deficiencies and proceed either to allow an opportunity to correct the pleading or to strike the pleading. *Id.*

The State Engineer’s acceptance of a water rights application differs materially, however, from a clerk’s acceptance of a pleading. Whereas a court

clerk has a mandatory duty to accept a pleading even if it is nonconforming, the State Engineer himself (not merely a member of his clerical staff) has a mandatory duty to reject a nonconforming application. § 72-12-3(C). Moreover, whereas a court clerk has no discretion to inquire whether a pleading conforms to court rules, the State Engineer exercises discretion in determining whether an application conforms to Section 72-12-3. His discretion is reflected in his implementing regulation as well as the record of this case.

The State Engineer has by regulation established a detailed process of review of groundwater applications before they can be accepted for filing and publication. An incomplete or nonconforming application is to be returned to the applicant with a specification of required changes, and the applicant is to be given thirty days to make the changes:

(3) Before acceptance by the state engineer, applications tendered must conform to the requirements of the statutes and rules and regulations of the state engineer. . . . Applications which are defective as to form or fail to comply with the rules and regulations shall be returned promptly to the applicant with a statement of the changes required. If the changes are made and the application refiled with the state engineer within thirty (30) days after the applicant has been notified of the changes required, the application shall be processed with a priority date the same as the original filing date.

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In this case the State Engineer exercised his discretion in the manner contemplated by the statute and regulation. He requested additional information

which Augustin provided, including supplemental information on proposed well locations, well depths, and particular lands to be irrigated. [RP 71-84, 364-65]. He ordered publication of notice of the Application. [RP 86-102]. The State Engineer's water rights division, through legal counsel, then filed a formal request to docket the Application for hearing. [RP 65-66]. A hearing examiner opened a hearing docket and subsequently invoked the State Engineer's jurisdiction over the Application pursuant to Section 72-12-3. [RP 165, 308]. In the face of motions to dismiss on grounds that the Application was vague and incomplete, able legal counsel for the State Engineer's water rights division formally reaffirmed that (1) the Application "contains the statutory information to be designated by an applicant" and "meets the statutory requirements of Section 72-12-3(A)" for at least part of the appropriation sought; (2) "a significant portion of the Application contains sufficient information to proceed to a hearing on the merits"; and (3) at least "that portion of the Application should not be dismissed or denied without a hearing on the merits." [RP 502-03, 505].

In short, the State Engineer's acceptance and designation of the Application for hearing was no mere ministerial act. The State Engineer goes to extraordinary lengths on appeal to disavow the actions taken by legal counsel and other members of his staff, treating his water rights division as if it were an unrelated third party and criticizing its actions as "patently unfair" and "not in the public interest." [AB-

SE 6-7, 25-31, 34]. The fact remains, however, that the Office of the State Engineer undertook to exercise “adjudicative jurisdiction” over the Application. See *Lion’s Gate Water*, 2009-NMSC-057, ¶¶ 24-26 (discussing scope of State Engineer’s “adjudicative jurisdiction” over application). At that point, the State Engineer could not simply reverse course and deny a party the process that the Water Code guarantees. See *id.* ¶ 31; *Derringer*, 2001-NMCA-075, ¶¶ 13, 15.

The issue is not one that “sounds in estoppel.” [AB-PR 26]; see [AB-SE 25-26]. It sounds in the State Engineer’s accountability for acts performed by his employees in the discharge of his statutory duties. Whereas the State Engineer’s failure to enforce a requirement in one case does not “estop” him from enforcing it in another case, *Hanson v. Turney*, 2004-NMCA-069, ¶ 21, 136 N.M. 1, 94 P.3d 1, his invocation of jurisdiction over an application entails a commitment to afford the procedural protections that the law requires. §§ 72-12-3(C), 72-2-16, 72-2-17.

Finally, the State Engineer professes concern that the Application was not sufficiently specific to enable potential objectors to decide whether to object—contrary to the position taken below that notice in this case “was reasonably calculated to apprise interested persons” of “a potential new water use” that “could affect their existing rights.” Compare [AB-SE 6-7, 32-35], with [RP 504]. The State Engineer answers his own concern, however, by conceding that potential

objectors were fully able to protect their interests by the simple expedient of filing objections “as a protective measure.” [AB-SE 34].

C. Augustin Timely Requested a Hearing

Appellees argue that Augustin did not preserve its claim of error for appeal. [AB-SE 15; AB-PR 33-35; AB-CV 4]. They reason that Augustin demanded an evidentiary hearing *before* its Application had been denied—in the face of motions to dismiss the Application without an evidentiary hearing—rather than waiting until *after* entry of an order denying its Application without a hearing. [AB-SE 15; AB-PR 34; AB-CV 4]. Appellee’s preservation argument should be rejected.

To preserve a question for appeal, it must appear that a ruling or decision by the lower tribunal “was fairly invoked.” Rule 12-216(A) NMRA. No one seriously disputes that a ruling or decision by the State Engineer was fairly invoked. Augustin not only made a timely written request for an evidentiary hearing, but it advanced extensive argument in support of its position that the State Engineer was required to hold such a hearing and to consider the full merits of its Application. [BIC 6, 8, 12-13, 32-33] (providing record citations showing Augustin’s invocation of ruling on request for evidentiary hearing). Augustin’s timely invocation of its rights met the preservation requirements of Rule 12-216(A). *See, e.g., Garcia ex rel. Garcia v. La Farge*, 1995-NMSC-019, ¶¶ 27-32, 119 N.M. 532, 893 P.2d 428 (rejecting argument that plaintiffs should be denied their day in court

on ground that their counsel did not rely on dispositive case in opposing summary dismissal of complaint).

Augustin's request for an evidentiary hearing likewise met the requirements of the Water Code, which entitles an aggrieved party to a hearing when the State Engineer, without holding a hearing, makes a decision, act or refusal to act, so long as "a request for a hearing is made in writing within thirty days after receipt by certified mail of notice of the decision, act or refusal to act." § 72-2-16. Augustin's written demand for a hearing was made well before the date thirty days after it received a copy of the State Engineer's decision denying its Application. [RP 521-58]. Its prompt request for a hearing is the polar opposite of the inaction of the defendant in *D'Antonio*, 2008-NMCA-139, whose multiple procedural defaults—including a complete failure to request a hearing contesting summary judgment for the State Engineer—resulted in waiver of the right to a hearing. *Id.* ¶¶ 3-4, 10. The defendant in *D'Antonio* "did nothing but vitiate the process intended to support the meaningful resolution of his dispute." *Id.* ¶ 10. In contrast, Augustin did everything it could as early as it could to avail itself of the process intended to support the meaningful resolution of its dispute.

Appellees insist that Augustin's requests came too soon because, as the State Engineer puts it, "there was no State Engineer decision to aggrieve" until the order denying the Application was entered. [AB-SE 15]. It is undoubtedly true that in

most cases a party will not have occasion to request an evidentiary hearing until after the State Engineer has taken some action without holding a hearing, because until then the party has no reason to anticipate that his or her claim for relief will be denied without a hearing. Here, however, there was no ambiguity about the course of action that the State Engineer was contemplating. Not only was Augustin confronted with multiple motions urging summary dismissal of its Application, but the State Engineer's hearing examiner explicitly anticipated the eventuality of the Application being "denied or dismissed." [RP 309].

In these circumstances, it would be the height of formalism to say that Augustin should have sat mum and waited until *after* entry of an order granting the motions to dismiss before demanding an evidentiary hearing; or, alternatively, that it should have demanded an evidentiary hearing *before* the motions to dismiss were granted, and then repeated the same demand *after* the motions were granted. That would be the equivalent of requiring not only a timely objection before a ruling, but also a formal exception after the ruling, in order to preserve the objection. The New Mexico courts have eschewed such formalism. Rule 12-216(A) ("[F]ormal exceptions are not required . . ."); *see Garcia*, 1995-NMSC-019, ¶ 32 (observing that preservation rules "are not an end in themselves, rather they are instruments for doing justice").

In sum, Augustin made a timely written request for an evidentiary hearing and argued at length the reasons why the State Engineer was required to hold such a hearing before granting or denying the Application. The State Engineer nevertheless denied the Application without an evidentiary hearing. Augustin did not waive, but vigorously asserted, its right to an evidentiary hearing at issue here.

D. Allowing Augustin to File Another Application Does Not Remedy the Denial of a Hearing

Appellees suggest that Augustin has no cause for complaint because it “can simply file another application with the state engineer.” [AB-PR 33]; *see* [AB-SE 35-36]. That is like telling a prisoner that she need not be concerned about being convicted and sentenced without a trial because she can simply file a habeas corpus petition and ask for a hearing then. Given that the State Engineer has already deprived Augustin of an evidentiary hearing—and insists that he need not ever grant a hearing—there is no reason to expect that, absent this Court’s intervention, the State Engineer would honor Augustin’s right to be heard on the merits of a second application.

Moreover, the State Engineer is mistaken that the filing of a new application would avert injury to Augustin. The legal consequence of filing a new application would be to forfeit Augustin’s priority of right to the water rights it seeks, which, under the current Application, relates back to its filing in October 2007. *See, e.g., State ex rel. State Eng’r v. Comm’r of Pub. Lands*, 2009-NMCA-004, ¶ 15, 145

N.M. 433, 200 P.3d 86. If Augustin must refile, it will be unfairly deprived of priority, and it will have no assurance that the next time around the State Engineer will afford it the process that is due. The State Engineer should not be left to repeat his error.

CONCLUSION

The district court's decision and order on Protestants' motion for summary judgment should be reversed and the case should be remanded to the State Engineer for an evidentiary hearing on the Application.

STATEMENT REGARDING ORAL ARGUMENT

Augustin agrees that oral argument may assist the Court in its interpretation of the New Mexico Water Code provisions governing the process that is due in permitting proceedings before the State Engineer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 7, 2013, I caused a true copy of this *Reply Brief* to be served by first-class United States mail, postage prepaid, on the following:

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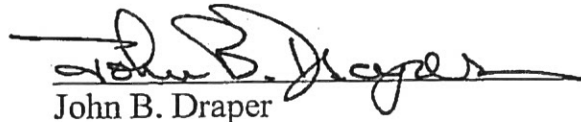
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